91-255

No. _____

In The

Supreme Court of the United States

October Term, 1991

JOHN BOURGUIGNON AND
CYNTHIA BOURGUIGNON,

Petitioners,

vs.

HOLIDAY INNS OF AMERICA, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Constitution of the United States, Missouri cannot deny citizens of other states the same right to seek redress for torts committed in Missouri by prosecuting separate actions against joint and several tortfeasors as that right is afforded to citizens of Missouri. This case presents a question of Missouri's de facto denial, by court decisions, of equal access to Missouri courts for citizens of Illinois:

> Where two unrelated torts were committed in Missouri by joint and several tortfeasors in which a citizen of Missouri was damaged by one tort and two citizens of Illinois were damaged by the other can Missouri, by court decisions written by the same judge within one calendar year, deny to the Illinois citizens the right to seek further relief in Missouri courts against a remaining joint and several tortfeasor after they settled with another of the tortfeasors while holding to the contrary in granting the identical right to a Missouri citizen to continue seeking further relief in Missouri courts against remaining joint and several tortfeasors after he, too, settled his separate action against another of the tortfeasors?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners John Bourguignon and Cynthia Bourguignon respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit which, by memorandum dated March 19, 1991 affirmed the judgment of the United States District Court for the Western District of Missouri dated June 8, 1990 which had sustained a motion to dismiss and had dismissed the Complaint without a hearing on the merits.

Petitioners' petition for rehearing was denied by the United States Court of Appeals for the Eighth Circuit on May 14, 1991.

OPINIONS BELOW

The opinion of the District Court filed on June 8, 1990, and the per curiam memorandum opinion of the Court of Appeals filed on March 19, 1991 are not reported either officially or unofficially and are appended to this Petition as Appendices I and II.

A copy of the order denying rehearing is appended as Appendix III.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was filed March 19, 1991.

The Petition for Rehearing was denied May 14, 1991.

Jurisdiction of this Court is invoked under Article III, section 2 of the United States Constitution and the United States Code, Title 28, Section 1254(1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article III, Section 2:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Constitution of the United States, Amendment Fourteen, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article IV, Section 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."

Constitution of the United States, Article VI, clause 2:

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be

made under the authority of the United States, shall be the supreme law of the land; . . . . "

STATEMENT OF THE CASE

In parallel but unrelated tort cases, decided on appeal by opinions written by the same Missouri Court of Appeals judge within one year's time, the State of Missouri gave access to Missouri trial courts to a citizen of Missouri, Dr. Victor Arana, but denied equal access to Missouri trial courts under identical conditions to petitioner citizens of Illinois, John and Cynthia Bourguignon.

This petition is for certiorari to the United States Court of Appeals for the Eighth Circuit for review of its judgment which erroneously gave full faith and credit to the state court judgment which denied to the Illinois citizens equal access to Missouri courts.

1. Tort Damage to Illinois Citizens

Holiday Inns, Inc., acting as contracted swimming pool builder in Missouri, constructed a swimming pool at a motel in Warrensburg, Missouri for its owner, Thirteen-Fifty Investment Co.

The pool was too shallow for safe diving but was equipped with a diving board, false depth markers and was licensed for diving by the State of Missouri as a result of fraudulent plans and depth representations made by pool builder Holiday Inns to the State of Missouri, misrepresentations made unbeknownst to the motel owner.

Illinois citizen Sergeant John Bourguignon, a support member of the United States Air Force Thunderbirds, an internationally known precision flying demonstration team, was ordered into the State of Missouri for an air show demonstration scheduled for Whiteman Air Force Base at Knobknoster, Missouri, and was quartered in Thirteen-Fifty's motel at nearby Warrensburg.

Sergeant Bourguignon, standing next to the swimming pool's diving board, dove into the too-shallow pool, struck his head on the bottom and was rendered instantly a permanent quadriplegic, totally disabled for life.

2. Tort Damage to Missouri Citizen

Victor Arana, M.D., a licensed Missouri surgeon and a citizen of Missouri was sued by his patient, Mary Elam, for alleged medical malpractice. Dr. Arana was insured against public liability by Medical Protective Company of Fort Wayne, Indiana, whose policy afforded Dr. Arana veto power over settlements. Medical Protective and its attorneys settled the Elam claim without Dr. Arana's knowledge or consent.

3. Parallel Litigations

The long settled law of Missouri is declared in *Arana v. Koerner*, 735 S.W.2d 729, 734 (Mo. App. 1987):

> "A plaintiff suffering an injury by joint tortfeasors may sue each tortfeasor individually or may sue all tortfeasors in one action."

Dr. Arana sued his joint tortfeasors in two venues, declaring on the same transaction in each.

He sued his insurance company in the United States District Court for the Western District of Missouri (Appendix V) and sued the insurance company's lawyers in state court, the Circuit Court of Buchanan County. *Arana v. Koerner,* supra. During pendency of both actions he settled the federal court action, whereupon, the state court entered involuntary dismissal of the state court action against the lawyers. On appeal, the Missouri Court of Appeals, speaking through Gaitan, Presiding Judge, reversed the dismissal and ordered the separate case against the lawyers reinstated. *Arana v. Koerner,* supra.

The law of Missouri gave Mrs. Bourguignon a claim for loss of the consortium of her injured husband. Bourguignons declaring on the same transaction, just as *Arana* did, likewise sued their joint tortfeasors in two venues. Their separate damage action against the motel owner, only, although filed in the state Circuit Court of Johnson County, at Warrensburg, was transferred to the Circuit Court of Lafayette County where the pleadings were perfected for trial.

In Lafayette County, Bourguignons made a settlement with the motel owner which limited Bourguignons' right to execute on any judgment obtained against the motel owner. In that Lafayette County action, by third party petition, the motel owner sued the builder, Holiday Inns, Inc. for indemnity but Bourguignons never adopted Holiday Inns as a defendant and never stated a claim against Holiday Inns in that action. They were not required to do so under state law. *State ex rel. McClure v. Dinwiddie,* 213 S.W.2d 127 (Mo. banc 1948).

After obtaining judgment against the owner but before it was final, Bourguignons by separate action sued

the pool builder in the state Circuit Court of Johnson County, Missouri. They, too, suffered involuntary dismissal of their separate action against joint tortfeasor, Holiday Inns, Inc. On appeal, the same Missouri Court of Appeals speaking through the same Gaitan, Judge, affirmed the dismissal, denying the Illinois citizens access to Missouri courts to prosecute their separate action against the second joint tortfeasor. *John Bourguignon and Cynthia Bourguignon v. Thirteen-Fifty Investment Co. and Holiday Inns*, 759 S.W.2d 300 (Mo. App. 1988).

Application for transfer to the Supreme Court of Missouri was denied as a discretionary ruling of the Supreme Court. Under Missouri law it does not constitute a decision on the merits.

Bourguignons filed their tort action against Holiday Inns, Inc., in the United States District Court for the Western District of Missouri alleging diversity of citizenship and an amount in controversy exceeding $50,000 pursuant to United States Code, Title 28, Section 1332. A copy of the Complaint is appended as Appendix IV.

The federal district court, erroneously believing itself bound to the state court judgment of dismissal by full faith and credit requirements, dismissed the Complaint.

On appeal to the United States Court of Appeals for the Eighth Circuit, that court by memorandum opinion affirmed the district court's judgment of dismissal and a motion for rehearing was denied.

REASON FOR GRANTING THE WRIT

By its memorandum denial of appellate relief from the dismissal of the Complaint by the United States District Court for the Western District of Missouri, the United States Court of Appeals for the Eighth Circuit has decided an important question of federal law in a way that conflicts with *Truax v. Corrigan*, 257 U.S. 312, 314, 42 S.Ct. 124, 126-127, 66 L.Ed. 254, 259 (1921), wherein it is held that a state court's denial of a federal right by a judicial decision is not shielded from federal court review by the state court's mere disregard or denial of the existence or relevance of a federal question and conflicts with *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 1898, 72 L.Ed.2d 262, 281 (1982), where in denial of an all preclusive construction of the full faith and credit statute, 28 U.S.C. § 1738, it is written that a state, before its judgment qualifies for full faith and credit under § 1738, must satisfy the requirements of the Due Process Clause and that federal courts are not required to grant full faith and credit to state court judgments which do not do so. The dismissal by Missouri did not do so.

The State of Missouri should not be permitted to do by its judicial branch that which it cannot do by legislation, denying to Illinois citizens their constitutional right of equal access to Missouri courts for redress of wrongs suffered in Missouri as such access is afforded to Missouri citizens.

Adhering to the majority rule in the United States, Missouri has a long established and maintained common law procedure of permitting victims of torts committed in Missouri to sue joint and several tortfeasors in separate

actions. By its established practice, Missouri does not require joinder of a victim's several tort claims against joint and several tortfeasors into one action. *Arana v. Koerner,* 735 S.W.2d 729, 734 (Mo.App. 1987):

> "A plaintiff suffering an injury caused by joint tortfeasors may sue each tortfeasor individually or may sue all the tortfeasors in one action."

By judicial decision, Missouri unconstitutionally denied to your petitioner citizens of Illinois that right to sue joint and several tortfeasors in separate actions in Missouri courts.

Petitioners Bourguignon are husband and wife citizens of Illinois who were damaged by husband's injury caused by joint and several tortfeasors in Missouri. Their tort claims against one of the tortfeasors filed in a Missouri trial court were dismissed involuntarily after they settled their claims against another of the tortfeasors with the dismissal being affirmed on appeal to Missouri's intermediate court, the Missouri Court of Appeals. By its affirming opinion, reported as *Bourguignon v. Thirteen-Fifty Investment Co.,* 759 S.W.2d 300 (Mo.App. 1988), it denied to your petitioners the identical access to Missouri courts to sue joint and several tortfeasors in separate actions which is given to citizens of Missouri. *Arana v. Koerner,* supra. After the Supreme Court of Missouri exercised its jurisdictional discretion to deny transfer, Bourguignons filed their Complaint in the United States District Court for the Western District of Missouri (Appendix IV)

The federal district court did not look behind the state court's dismissal to perceive the state's denial of

federal due process and equal protections of law as is shown by the disparate results between the *Arana* case, supra, and the *Bourguignon* case, supra, and simply holding that it was bound to give full faith and credit to the state court's decision of dismissal, dismissed the Complaint.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment of dismissal without opinion.

Thus, the United States Court of Appeals for the Eighth Circuit erroneously abrogated its duty to correct Missouri's denial of federal due process and equal protections of law as it has clear jurisdiction and a right to do under *Truax v. Corrigan*, supra, and under *Kremer v. Chemical Construction Corp.*, supra.

In *Truax* it is held, 257 U.S. 324, 42 S.Ct. 126-127, 66 L.Ed. 259, in denying blind application of full faith and credit to a state court decision on federal law:

> " . . . this court, as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

The same Missouri judge speaking for the same Missouri appeals court within one year's time permitted access to the Missouri trial courts for a citizen of Missouri and denied the same access to these citizens of Illinois in identical circumstances.

Missouri's law permitting tort victims to sue joint and several tortfeasors by separate actions is approved by decisions of Missouri's highest court, its supreme court. Decisions of Missouri's court of appeals cannot overrule nor change the law declared in decisions of Missouri's supreme court. Thus, the state court of appeals opinion cannot and did not change Missouri's law of providing redress against joint and several tortfeasors by separate actions.

It only denied that right to Illinois citizens.

The Missouri Court of Appeals affirmance of the Bourguignon dismissal ostensibly was based on Bourguignons' knowledge of the facts supporting their dismissed claims at the time they settled with the other tortfeasor, *id*, 759 S.W.2d 303:

> "Both actions by the Bourguignons involve the accident of John Bourguignon in the swimming pool in Warrensburg on June 27, 1977, and the potential responsibility of John Bourguignon, Thirteen-Fifty and Holiday Inns for his injury and his wife's derivative claims. The Bourguignons and the Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action. . . . All of the facts relied upon by the Bourguignons and Thirteen-Fifty in support of their present tort, fraud and contractual indemnity claims were known during discovery and before the trial of the first action."

Knowledge of the facts of a tort is no reason for denying access to Missouri courts for redress. Missouri citizen Arana also knew, as a matter of law, all of the facts upon which his dual pending actions were based at the

time he settled his federal court action. His knowledge did not bar his state court action as Missouri conversely held that the knowledge of these Illinois citizens barred their action.

Regarding the fundamental importance of the constitutional right of equal access to the courts, in a constitutional discourse preliminary to the examination of an Ohio statute related to access to Ohio's courts, it is written in *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143, 146:

> "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution."

In *American Federation of Labor v. Swing*, 312 U.S. 321, 326-327, 61 S.Ct. 568, 570, 85 L.Ed. 855, 857 (1941), in discussion of the constitutional guaranty of free speech in a labor right-to-picket case, it is indicated that a state may not deny a constitutionally guaranteed right by judicial decision if it cannot deny that identical constitutional right by legislative enactment:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an

> industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."

On the face of the two relevant Missouri Court of Appeals opinions, *Arana v. Koerner*, supra, and *Bourguignon v. Thirteen-Fifty Investment Co.*, supra, citizenship is not mentioned, the fact of a classification based on citizenship is not patent and, accordingly, the opinions deceptively would indicate only that an error of state law has occurred in the dismissal of the action of the Illinois citizens.

But, as is suggested in *Truax v. Corrigan*, supra, the constitutionally proscribed discrimination based on citizenship is readily identified and made salient by looking behind the decision to the undisputed facts of citizenship which were lodged before the Missouri Court of Appeals. The facts demonstrate that the only distinction between the cases, one dismissed, the other reinstated, is the citizenship of the claimants. Judicial silence concerning citizenships of the claimants cannot serve constitutionally to legitimize denial of equal access to Missouri courts by the citizens of Illinois. There is no legitimate state purpose served by permitting Missouri citizen Arana to sue in state court and barring Illinois citizens Bourguignons in their identical circumstances.

Unconstitutional discrimination is wherever it is found, not merely where it is admitted.

On the rationale of *Truax v. Corrigan*, supra, the unconstitutional de facto discrimination made against these Illinois citizens by Missouri's state court affirmance

of the dismissal of their action is not shielded from federal court review by the state court's silence on the fact of their foreign citizenship which carries with it the federal right of equal access to Missouri's courts. Paraphrasing, if the rule were otherwise, it almost always would be within the power of a state court to deny to citizens of other states the equal access to the state's courts which is guaranteed by the federal constitution.

This petition for certiorari presents a constitutional question of national importance. If the State of Missouri by judicial fiat which merely fails to mention citizenship can deny to citizens of other states equal access to Missouri courts, then every other state may do the same, in circumvention of Article IV, Section 2 of the Constitution of the United States.

Petitioners respectfully suggest that the Petition for Writ of Certiorari should be granted to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2147

John Bourguignon and Cynthia Bourguignon,	*	
Appellants,	*	Appeal from the United States District Court for the Western District of Missouri.
vs.	*	
Holiday Inns of America, Inc.,	*	
Appellee.	*	[UNPUBLISHED]
	*	

Submitted: March 13, 1991
Filed: March 19, 1991

Before FAGG, Circuit Judge, SNEED,* Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

John and Cynthia Bourguignon appeal from the district court's dismissal[1] of their lawsuit against Holiday Inns of American for intentional and fraudulent concealment of the defective construction of a swimming pool.

---

*The HONORABLE JOSEPH T. SNEED, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

The district court determined that the Bourguignon's claims were previously decided by the Missouri Court of Appeals in *Holiday Inns v. Thirteen-Fifty Investment Co.*, 714 S.W.2d 597 (Mo. App. 1986) and *Bourguignon v. Thirteen-Fifty Investment Co.*, 759 S.W.2d 300 (Mo. App. 1988), and thus were barred from reconsideration in federal court by collateral estoppal [sic] and res judicata. Having thoroughly reviewed the record, we agree with the district court's careful analysis and accordingly affirm its decision. *See* 8th Cir. R. 47B.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

JOHN BOURGUIGNON and CYNTHIA BOURGUIGNON,	)	
Plaintiffs,	)	No. 89-4126-CV-C-9
v.	)	FILED JUN 08 1990
HOLIDAY INNS OF AMERICA, INC.,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S MOTION FOR SANCTIONS

This case arises out of an accident that occurred at the Holiday Inn at Warrensburg, Missouri, on June 27, 1977. Plaintiff John Bourguignon dove into the swimming pool at the Holiday Inn and struck his head on the bottom of the pool. Since the accident, John Bourguignon has been a quadriplegic, paralyzed from the neck down.

Defendant argues that this case should be dismissed because it has twice been considered and ruled on in *Holiday Inns. Inc. v. Thirteen-Fifty Investment Co. and John Bourguignon and Cynthia Bourguignon,* 714 S.W.2d 597, (Mo. App. 1986) (*Bourguignon I*) and in *John Burguignon [sic] and Cynthia Bourguignon v. Thirteen-Fifty Investment Co. and Holiday Inns, Inc.,* 759 S.W.2d 300 (Mo. App. 1988) (*Bourguignon II*). Therefore, defendant argues that plaintiffs' claim is barred by res judicata and that plaintiffs are collaterally estopped from raising in this case issues that have previously been decided. Plaintiffs argue that the doctrines of res judicata and collateral estoppel do not

apply because the claim and issues that they raise in this lawsuit have never been litigated.

I. Litigation History

A. Bourguignon I

John Bourguignon and his wife, Cynthia, filed suit in Lafayette County Circuit Court against Holiday Inns' franchisee, Thirteen-Fifty Investment Company (Thirteen-Fifty), the motel operator, alleging negligent maintenance of the swimming pool. Specifically, the Bourguignons alleged that Thirteen-Fifty failed to maintain the pool in a safe condition, that the water in the pool was unreasonably dirty and murky, that the pool area and specifically the water in the pool was poorly lighted and the pool area was not marked with warnings of the dangerous conditions present.

On July 12, 1983, Thirteen-Fifty filed a third-party petition against Holiday Inns for contribution or indemnification in the event the Bourguignons obtained a judgment against Thirteen-Fifty. In the third-party petition, Thirteen-Fifty alleged that Holiday Inns was negligent in designating the architect, approving the architect's plans and constructing and inspecting the swimming pool. Additionally, Thirteen-Fifty alleged that Holiday Inns breached its contract for constructing the swimming pool by failing to comply with the architect's plans and specifications.

On July 31, 1984, the Bourguignons amended their petition alleging negligence against Thirteen-Fifty for the construction activities of Holiday Inns. Specifically, the

Bourguignons alleged that the swimming pool, constructed by Holiday Inns, was deceptively shallow, of insufficient depth for diving and that the tile markings did not warn of the correct depth.

On August 10, 1984, ten days after plaintiffs filed their First Amended Petition, plaintiffs, Thirteen-Fifty and Thirteen-Fifty's insurer, Employer's Mutual Casualty Company, entered into a settlement agreement. The agreement, allegedly made pursuant to § 537.065 R.S.Mo., limited the Bourguignons' recovery against Thirteen-Fifty to one million dollars plus any amount Thirteen-Fifty could collect on its contractual indemnity claim.

Holiday Inns filed a motion for a separate trial. The motion was denied and the Bourguignons' suit against Thirteen-Fifty was tried together with Thirteen-Fifty's third party claim against Holiday Inns. Thirteen-Fifty submitted only the contractual indemnity claim against Holiday Inns to the jury.

The jury returned a verdict against Thirteen-Fifty in favor of John Bourguignon for $12,500,000 and Cynthia Bourguignon for $2,000,000. Both verdicts were reduced by ten percent for John Burguignon's [sic] comparative fault. The jury also returned a verdict in favor of Thirteen-Fifty on its contractual indemnification claim against Holiday Inns in the amount of $13,050,000.

Holiday Inns appealed the judgment entered against it on Thirteen-Fifty's third party claim and the Missouri Court of Appeals reversed. *Bourguignon I*, 714 S.W.2d 597. The holding in *Bourguignon I* was summarized in *Bourguignon II* as follows:

> This court held that Thirteen-Fifty breached its duties to its indemnitor, Holiday Inns, by actively helping the Bourguignons prove liability against Holiday Inns while Thirteen-Fifty represented to the jury that it was contesting the case. Further, at the trial of the first action, Thirteen-Fifty's counsel made no attempt to cross-examine plaintiffs' expert economist, and in the closing argument, Thirteen-Fifty's counsel admitted liability for having a dangerous swimming pool on its premises and argued against John Bourguignon's contributory negligence. Other examples of the combined efforts of the Bourguignons and Thirteen-Fifty at the trial of the first action against Holiday Inns were cited by this Court. These efforts resulted in an adverse ruling on Thirteen-Fifty's third party action.
>
> This Court held that due to the prejudicial conduct of Thirteen-Fifty, combined with the Bourguignons, Holiday Inns would be discharged from and obligations in indemnity. As a consequence, we reversed the jury verdict against Holiday Inns without remanding for trial. The Supreme Court denied the Bourguignons' Petition for a Writ of Prohibition and also denied the applications for transfer filed by the Bourguignons and Thirteen-Fifty. That judgment thereafter became final.

Bourguignon II, 759 S.W.2d at 301.

The court in *Bourguignon I* concluded that the purpose behind the settlement agreement between the Bourguignons and Thirteen-Fifty and its insurer was "to rectify plaintiff's failure to file suit against Holiday Inns before the running of the statute of limitations. It attempts to force Holiday Inns Inc. to make a status

change from third-party defendant into 'defendant.' " *Bourguignon I*, 714 S.W.2d at 603, n.3.

B. Bourguignon II

While *Bourguignon I* was on appeal, the Bourguignons filed a new case against Thirteen-Fifty and Holiday Inns. In their Second Amended Petition plaintiffs sought to enforce an equitable creditor's bill granting the Bourguignons an interest in Thirteen-Fifty's non-contractual indemnity claim against Holiday Inns to satisfy the unpaid balance of the Bourguignons judgment against Thirteen-Fifty. Also, plaintiffs alleged that Holiday Inns had intentionally and fraudulently concealed the defective construction of the swimming pool. (These allegations of fraud against Holiday Inns are identical to the allegations of fraud in the present action.) In *Bourguignon II*, Thirteen-Fifty filed a Cross-Claim and a First Amended Cross-Claim against Holiday Inns for non-contractual indemnification.

The circuit court granted Holiday Inns' Motion to Dismiss Plaintiffs' Second Amended Petition and Thirteen-Fifty's First Amended Cross-Claim:

> In this action, plaintiffs contend [1] defendant Thirteen-Fifty still retains a cause of action against Holiday Inns on a tort theory, or non-contractual indemnification, and that the Western District's judgment reversal should be construed strictly to apply only to the contractual indemnification claim, and that both liability and the amount of damages, including the apportionment, was determined in plaintiffs' first suit, and these issues are res judicata and binding on all parties, and [2] plaintiffs now

have a right to collect the total amount of their judgment against Thirteen-Fifty on a "creditor's bill" theory against judgment debtor Thirteen-Fifty's chose against Holiday Inns pleaded in Thirteen-Fifty's cross-claim herein against Holiday Inns.

It is plaintiffs' position Thirteen-Fifty's right to tort recovery in non-contractual indemnity is not before the court in *Holiday Inns v. Thirteen-Fifty*, supra and that the decision therein does not bar plaintiffs' action and the cross-claim here. This position is bottomed on the theory that Thirteen-Fifty did not, in fact, have a cause of action against Holiday Inns in the first case on a contractual indemnity theory, submitted its claim on a misconceived availability of a remedy, and pursued an imaginary or mistaken remedy which, under *Pemberton v. Ladue Realty Company*, 224 S.W.2d 383 (Mo. 1949) and *Hollipeter v. Stuyvesant Ins. Co.*, 523 S.W.2d 595 (K.C. 1975), does not now bar recovery under a non-contractual indemnity theory.

. . .

This court feels a strong and compelling sympathy with the plaintiffs in their tragic and horrendous loss. The urge to adopt the position taken by plaintiffs and defendant Thirteen-Fifty in this matter is overwhelming. But it troubles the court to accept the position of plaintiffs and Thirteen-Fifty which would seem to encourage others in like situations to combine to their advantage impermissibly to prejudice the rights of a contractual indemnitor and then, if caught up short, return to the starting line and jointly pursue, as here, the indemnitor again on another theory and contend all the while the amount of damages and determination of percentage of fault is res judicata and cannot be

> questioned by the indemnitor in the second action.
>
> The Court finds and holds that whether Holiday Inns' motions are characterized as motions to dismiss or, as plaintiffs urge, motions for summary judgment, plaintiffs' amended petition and Thirteen-Fifty's amended cross-claim are dismissed on the basis that by the ruling of the Missouri Court of Appeals in *Holiday Inns v. Thirteen-Fifty Investment Company and John Bourguignon and Cynthia Bourguignon*, 714 S.W.2d 597 (Mo. App. 1986), they are now estopped from asserting further right to collect plaintiffs' judgment against Holiday Inns and that there is no judgment upon which execution can issue in favor of plaintiffs against Holiday Inns.

In his opinion, the trial judge focused on plaintiffs' effort to stand in Thirteen-Fifty's shoes and assert Thirteen-Fifty's non-contractual indemnity claim against Holiday Inns. The fraud claims were not mentioned. However, the fraud claims, as well as the equitable garnishment claims, were dismissed.

The Bourguignons and Thirteen-Fifty appealed. The Court of Appeals affirmed the circuit court's order in *Bourguignon II*, 759 S.W.2d 300.

> Here, we find that because the claims of noncontractual indemnity and contractual indemnity were used as strategic devices by Thirteen-Fifty in the first action, Thirteen-Fifty's election of one remedy and abandonment of the other should be binding on Thirteen-Fifty. As Thirteen-Fifty has taken one remedy to judgment and lost, they should not be allowed to follow that action with an alternative theory of recovery. Once again, it should be stated that Thirteen-Fifty did have the remedy of contractual

> indemnity, but through its course of prejudicial conduct, it forfeited that remedy.

Id. at 304.

In their briefs on appeal, in addition to challenging the circuit court's dismissal of the equitable garnishment claim, the Bourguignons challenged the dismissal of their tort claims against Holiday Inns. The Bourguignons argued that "[t]he trial court erred in dismissing plaintiffs' entire petition on a finding that defendant Thirteen-Fifty's claim for indemnity against Holiday Inns is barred by estoppel because . . . the fact plaintiffs may be estopped from collecting damages from Holiday Inns by equitable garnishment of Thirteen-Fifty's claim for indemnity does not bar plaintiffs' second tort claim against Holiday Inns." Statement Brief and Argument of Appellants Bourguignon at 6.

Holiday Inns responded in Point Relied On II of its brief on appeal that the tort claims were properly dismissed because "the Bourguignons' tort claims are barred by the doctrines of res judicata and collateral estoppel as discussed in Point III of this brief." Point Relied On III reads as follows:

> THE CIRCUIT COURT PROPERLY DISMISSED THE BOURGUIGNONS' SECOND AMENDED PETITION AND THIRTEEN-FIFTY'S FIRST AMENDED CROSSCLAIM IN THE SECOND ACTION AS THESE PLEADINGS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL, AS ALL OF THE ALLEGATIONS OF THESE PLEADINGS WERE RAISED OR COULD HAVE BEEN RAISED BY THE BOURGUIGNONS AND THIRTEEN-FIFTY IN THE FIRST ACTION INVOLVING THE SAME PARTIES, EVENT AND ISSUES, WHICH WAS

DECIDED BY THIS COURT AND REPORTED AT 714 S.W.2d 597.

Two of the cases cited by Holiday Inns in support of this point were *Siesta Manor, Inc. v. Community Federal Savings & Loan Assn*, 716 S.W.2d 835 (Mo. App. 1986) and *Dreckshage v. Community Federal Savings & Loan Assn*, 641 S.W.2d 831 (Mo. App. 1982). In their Reply brief plaintiffs disputed the application of these cases.

The Missouri Court of Appeals responded to these arguments by making clear that its affirmance was not restricted to approving dismissal of the plaintiffs' attempt to equitably garnish Thirteen-Fifty's noncontractual indemnity claim. The court also approved dismissal of the plaintiffs' tort claims against Holiday Inns.

> The doctrines of res judicata and collateral estoppel require dismissal when a party tries to relitigate an action involving the same events, parties and issues as in a previously decided action. This is true notwithstanding the parties' attempt to pin a different label on its legal theories in the second lawsuit. *Siesta Manor, Inc. v. Community Federal Savings & Loan Ass'n.*, 716 S.W.2d 835 (Mo. App. 1986); *Dreckshage v. Community Federal Savings & Loan Ass'n.*, 641 S.W.2d 831 (Mo. App. 1982).
>
> Both actions by the Bourguignons involve the accident of John Bourguignon in the swimming pool in Warrensburg on June 27, 1977, and the potential responsibility of John Bourguignon, Thirteen-Fifty and Holiday Inns for his injuries and his wife's derivative claims. *The Bourguignons and Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action.* As a matter of fact, as previously stated, Thirteen-Fifty initially alleged non-contractual

> indemnity and tort claims against Holiday Inns in the first action, but they intentionally and strategically abandoned all claims except contractual indemnity in that first action. *All of the facts relied upon by the Bourguignons and Thirteen-Fifty in support of their present tort, fraud, and non-contractual indemnity claims were known during discovery and before the trial of the first action.*

Bourguignon II, 759 S.W.2d at 303 (emphasis added).

II. Discussion

A. Full Faith and Credit

Referring to 28 U.S.C. § 1738, the Supreme Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1982), stated that: "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."

> Where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. . . . As we recently noted in *Allen v. McCurry, supra*, 'though the federal courts may look to the common law or to the policy supporting res judicata and collateral estoppel

> in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgments emerged would do so. . . . '
>
> The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the 'same' preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.

Id. at 1897-98 (citations omitted).

Defendant argues this case should be dismissed because of the holding in *Bourguignon II*:

> The Missouri Court of Appeals decision in *Bourguignon II* operates as a binding decision for this court pursuant to *Gribben v. Lucky Star Ranch Corp.*, 623 F. Supp. 952 (W.D. Mo. 1985), in which this court held that when a prior judgment is rendered in a state court, a federal court is required to give the judgment the same preclusive effect as the judgment would have received in the state in which it is rendered.

Defendant's Suggestions in Support of Motion to Dismiss at 8.

Plaintiffs argue that the trial court and the appellate court in *Bourguignon II* did not consider or adjudicate the Bourguignons' fraud action against Holiday Inns. Plaintiffs' Response to defendant's Motion to Dismiss at 13.

"In *Bourguignon II* Judge Barnes of the Circuit Court of Johnson County, Missouri, decided only two issues; Thirteen-Fifty did not have a cause of action against Holiday Inns for noncontractual indemnification and the Bourguignons could not collect from Holiday Inns, on a creditor's bill the total amount of their judgment against Thirteen-Fifty." *Id.* at 13-14. Plaintiffs further argue that, "the entire and sole focus of the appellate court's opinion, as it pertained to the Bourguignons, was that there did not exist contractual or non-contractual indemnity running from Holiday Inns to Thirteen-Fifty for the amount of the Bourguignons' judgment against Thirteen-Fifty in *Bourguignon I*. The Court of Appeals decided nothing more or no less." *Id.* at 16. Plaintiffs conclude, therefore, that:

> The application of *Bourguignon I* as res judicata and collateral estoppel to the claims and issues which were before the appellate court in *Bourguignon II* underscores the fact that *Bourguignon II* concerned *indemnification only*. The Court of Appeals simply did not consider the Bourguignons' fraud action against Holiday Inns. The judgment of the trial court and affirmance by the Court of Appeals addressed the Bourguignons' action on a creditor's bill and left the fraud action unresolved.

Id.

The history of this case provides unusual guidance for my decision. Typically, when a federal court is asked to determine whether a state court judgment bars further litigation under the doctrines of res judicata and collateral estoppel, the federal court is obligated to predict how

the state from which the judgment was taken would apply those doctrines. In this case, however, the Missouri Court of Appeals in *Bourguignon II* has determined the preclusive effect of *Bourguignon I*.

As demonstrated by the previous discussion of *Bourguignon II*, the parties argued before the Court of Appeals the issue of whether the Bourguignons' fraud claims against Holiday Inns were barred. In response to these arguments, the Court of Appeals decided the entire Second Amended Petition, including the fraud claims, was properly dismissed. "The Bourguignons and Thirteen-Fifty have merely framed their pleadings in this second action around legal theories which were available to them at the time of the first action." 759 S.W.2d at 303.

Plaintiffs argue that the court's discussion of the doctrines of res judicata and collateral estoppel in *Bourguignon II* is merely *obiter dictum*. I disagree. The Missouri Court of Appeals discussion of the fraud claims and its conclusion that the fraud claims were barred was essential to its decision to affirm the dismissal of all claims asserted in plaintiffs' Second Amended Petition.

Accordingly, I will give *Bourguignon II* the same preclusive effect that I believe *Bourguignon II* would be given by Missouri courts. Had the plaintiffs brought their fraud claims in a Missouri court rather than here, a Missouri court would have dismissed them based on *Bourguignon II*. There would have been an "(a) identity of the thing sued for; (b) identity of the cause of action; (c) identity of the parties to the action; and (d) identity of the quality of the person for or against whom a claim is made." *See State ex rel. Agri-Trans Corp. v. Nolan*, 756 S.W.2d 203, 207

(Mo. App. 1988). The proceedings in *Bourguignon II* satisfy due process because plaintiffs had a full and fair opportunity to litigate the issue of whether their fraud claims were barred by res judicata and collateral estoppel.

Furthermore, I will accord *Bourguignon I* the same preclusive effect that *Bourguignon I* was given by the Missouri Court of Appeals in *Bourguignon II*. Again, no due process problems exist because plaintiffs were afforded a full and fair opportunity to litigate their fraud claims in *Bourguignon I* for the reasons stated in *Bourguignon II*.

Accordingly, granting *Bourguignon I* and *Bourguignon II* the same preclusive effect here as they would receive in Missouri state courts, defendant's Motion to Dismiss will be granted.

D. Sanctions

Rule 11 sanctions will not be imposed in this case. I believe that plaintiffs' counsel conducted a reasonable investigation into the facts and the law surrounding these issues. Careful research and a thorough presentation should not always lead to a conclusion that sanctions are inappropriate if the issues raised are frivolous. Here, however, the complexity of the facts and the somewhat obtuse state court decisions counsel against the imposition of sanctions.

IV. Conclusion

Accordingly, it is hereby ORDERED that:

1) defendant's Motion to Dismiss is granted; and

2) defendant's Motion for Sanctions is denied.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
June 8, 1990.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2147WM

John Bourguignon and Cynthia Bourguignon,	*	
Appellants,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Holiday Inns of America, Inc.,	*	
Appellee.	*	

Appellants' petition for rehearing has been considered by the court and is denied.

May 14, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
MISSOURI, CENTRAL DIVISION

JOHN BOURGUIGNON and CYNTHIA BOURGUIGNON, Plaintiffs, vs. HOLIDAY INNS OF AMERICA, INC., Defendant.	)	No. 89 4126-CV-C-9 FILED MAR 29 1989

COMPLAINT

1. Plaintiffs are husband and wife, invoke diversity jurisdiction and for their personal injury tort claims which accrued in and under the laws of Missouri further allege and state.

Jurisdiction

2. Plaintiffs are citizens and residents of the State of Illinois. Defendant corporation is incorporated under the laws of Delaware, has its principal place of business in Memphis, Tennessee, and does business in the State of Missouri including business within the Central Division of the Western District of Missouri. The amount in controversy in each claim, exclusive of interest and costs, exceeds fifty thousand dollars.

Facts

3. In Warrensburg, Missouri, on June 27, 1977, plaintiff husband was a guest in a Holiday Inn motel which had been constructed by defendant for its franchisee operator, Thirteen-Fifty Investment Company. Then and there, during the hours of darkness, with defendant's fraudulent concealment of danger or its reckless disregard for the safety of plaintiff husband or by its negligence, defendant invited and induced plaintiff husband to dive into the motel swimming pool which was known to defendant to be too shallow for safe diving, and thus and thereby defendant caused or contributed to cause plaintiff husband to break his neck and become permanently quadriplegic and totally disabled and dependent for his daily survival on others, directly causing plaintiffs to sustain damage as hereafter set forth.

4. The State of Missouri regulates the safety of motels for guests as part of the state's annual licensing for operation and requires motel swimming pools furnished for guest diving to have a minimum of eight and a half feet of water in the diving area. Defendant knowingly, willfully and intentionally constructed the pool in violation of the state safety regulation with less than the required diving depth and turned it over to its franchisee to be furnished for guest diving.

5. By constructing the pool too shallow for safe diving and furnishing it to its franchisee for use of guests for diving, defendant showed complete indifference to and conscious disregard of the safety of motel guests, including plaintiff husband.

6. Defendant affirmatively misrepresented and falsely warranted that the pool was constructed in compliance with the state's diving safety requirements and, specifically, that it had eight and a half feet of water in its diving pool as was required before the state would license the motel for operation with the swimming pool furnished for guest diving, in the particulars that:

a. Defendant franchisor required franchisee innkeeper to pay an architect, who was a director of franchisor corporation defendant and who maintained his offices in defendant's headquarters building in Memphis, Tennessee, to design the motel to meet defendant franchisor's specifications.

b. That architect originally designed the motel's swimming pool to have nine feet of water in the diving pool and the city of Warrensburg, Missouri, issued its building permit accordingly.

c. That architect revised the nine feet deep plans to provide for only eight feet of water in the diving pool, furnished the eight feet deep plans to defendant's "construction division" and submitted the revised eight feet deep plans to the State of Missouri for approval.

d. On November 14, 1968, the state rejected the revised eight feet deep plans and advised the architect that, among other changes which were needed, eight and a half feet of water was the minimum depth of water which the state would approve.

e. In response to the state's November 14 letter of rejection, the plans were revised again and on November 20, 1968, the architect sent the further revised plans to the state and advised by

cover letter: "The pool depth has been increased to 8'-6" deep."

f. Based on that revision, the state approved the eight and a half feet deep plans by letter of November 27, 1968, to the motel manager with a copy to the architect.

g. Defendant, through its "construction division" willfully disregarded both the eight feet deep plans and the eight and a half feet deep plans in the particular of pool depth and constructed the pool to a maximum depth of seven feet six inches except for a small sump area at the main drain which was deepened to seven feet eight and a half inches. At no place did the pool reach a depth of even the state-rejected eight feet depth.

h. Defendant had no intention, ever, of obeying the state requirement for eight and a half feet of water. At the very time the eight and a half feet of water revised plan was before the state for approval and yet unapproved, the pool already had been constructed to the point that the bottom was poured and the false 8 feet tile markers were set in the sidewalls of the pool where the already established pool depth was only seven feet three inches.

7. Defendant installed a diving board and stand for use of motel guests and thus falsely represented and warranted to its franchisee operator and motel guests that the pool was deep enough for safe diving.

8. Defendant intended that its false representations and warranties, both direct and indirect, that the pool complied with state safety requirements and was safe for diving should be believed by the State of Missouri and acted on in approving the pool, should be believed by its franchisee and acted on in its commercial acceptance of

the pool as constructed and should be believed and acted on by motel guests, including guest plaintiff husband, as a representation of the safety of the pool for diving which was material to plaintiff husband's use of the pool for diving.

9. Plaintiff husband did not know the pool was too shallow for safe diving and, because of the superior knowledge of defendant, whose nationally recognized name was on the motel, had a right to rely on the false representations made to him, direct and indirect, by defendant that the pool was safe for diving.

10. Plaintiff husband did believe and rely on defendant's direct and indirect misrepresentations and false warranties of safety made to him and, in his belief and reliance, was fraudulently induced by defendant to dive into the unsafe pool to his directly resulting permanent injury and damage, as abovesaid.

11. Plaintiffs live in Illinois and did not have investigative access to the dangerous pool nor the records of defendant. After plaintiff husband's injury, the measured depth of the pool, the records of the false pool plans submitted for approval of the state compared to the state's safety standards were not reasonably available to plaintiffs. Defendant fraudulently concealed its culpability by intentionally breaching its duty to tell the motel operator that the pool did not meet state safety requirements, that the tile depth markers were false and that the diving board invitation to guests to dive should be removed. After defendant's duplicity in construction and licensing of the pool, in the opinion of the motel operator's hired swimming pool expert, was discovered

in June 1984, defendant continued to actively conceal its intentional breach of the safety standards and, thus, to conceal the existence of plaintiffs' claims against it, by hiring a safety engineer who falsely stated that the game of water polo requires diving, that the state approves a minimum of six feet of water for pools used for water polo and that, thus, the state safety standards require only six feet of water for diving and that the pool did in fact comply with the state safety standards.

Plaintiff Husband's Claim

12. All preceding allegations are incorporated in plaintiff John Bourguignon's claim against defendant for his personal injury and damage.

13. In prior state court litigation, plaintiffs sued the innkeeper and the innkeeper sued defendant for indemnity. In that action to which the parties here were litigants and privies, the issue of the damages which John Bourguignon sustained as a result of the dangerous pool and his dive into it have been liquidated and finally adjudicated to be twelve million, five hundred thousand dollars. The prior decision of the issues of cause and damage is res judicata and cannot be relitigated or contested here by either plaintiffs or defendant.

14. The facts that defendant built the pool to the depth it had when John Bourguinon [sic] was injured and the fact that defendant misrepresented and concealed its true depth was admitted in the prior litigation, is res judicata and cannot be relitigated or contested here by plaintiffs or defendant.

15. Because said injury and actual damage was sustained by John Bourguignon as a direct result of the fraud of defendant and from defendant's complete indifference to and conscious disregard of the safety of John Bourguignon, he is entitled to recover exemplary and punitive damages of and from defendant in the reasonable sum of ten million dollars.

WHEREFORE, plaintiff John Bourguignon prays judgment against defendant in the adjudicated and res judicata sum of twelve million, five hundred thousand dollars for and as actual, compensatory damages and in the sum of ten million dollars for and as punitive damages together with judgment for plaintiff's costs.

Plaintiff Wife's Claim

16. All preceding allegations are incorporated in plaintiff Cynthia Bourguignon's claim against defendant for loss of her husband's support, aid, services and consortium which plaintiff wife has sustained and will sustain in the future because of the permanent injury and paralysis of her husband, abovesaid.

17. In the mentioned prior litigation, the damages which plaintiff wife sustained as a result of the dangerous pool and her husband's dive into it have been liquidated and adjudicated to be two million dollars. That issue of cause and damage is res judicata and cannot be relitigated or contested here by either plaintiffs or defendant.

18. Because said injury to her husband and actual damage to plaintiff wife were sustained as a direct result of the fraud of defendant and from defendant's complete

indifference to and conscious disregard of the safety of John Bourguignon, she is entitled to recover exemplary and punitive damages of and from defendant in the reasonable sum of ten million dollars.

WHEREFORE, plaintiff Cynthia Bourguignon prays judgment against defendant in the adjudicated and res judicata sum of two million dollars for and as actual, compensatory damages and in the sum of ten million dollars for and as punitive damages and for judgment for plaintiff's costs.

POLSINELLI, WHITE, VARDEMAN & SHALTON

By _____
Paul E. Vardeman
Plaza Theatre Building
4705 Central
Kansas City, Missouri
64112
(816) 931-3353

and

ANDERSON & MILHOLLAND

By /s/ John C Milholland
John C. Milholland
101 East Wall –
P.O. Box A
Harrisonville,
Missouri 64701
(816) 884-3218 or
524-7424

ATTORNEYS FOR PLAINTIFFS

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

POLSINELLI, WHITE, VARDEMAN & SHALTON

By _____
Paul E. Vardeman
Plaza Theatre Building
4705 Central
Kansas City, Missouri
64112
(816) 931-3353

and

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By /s/ John C Milholland
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(816) 884-3218 or
524-7424

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

VICTOR A. ARANA, M.D. Plaintiff	)	Case No. 83-6144-CV-55-6
vs.	)	JURY TRIAL ON
THE MEDICAL PROTECTIVE COMPANY OF FORT WAYNE, INDIANA, a Corporation	)	ALL CLAIMS DEMANDED
Defendant	)	FILED NOV 15 1983

COMPLAINT

Comes now plaintiff, Victor A. Arana, M.D., and for his cause of action against defendant The Medical Protective Company of Fort Wayne, Indiana, states as follows:

JURISDICTION

1. Jurisdiction is based on 28 U.S.C. Section 1332 in that the parties are residents of different states and the amount in controversey [sic] exceeds $10,000 exclusive of interest and costs.

THE PARTIES

2. Plaintiff is a resident of the State of Missouri, residing at 2015 North 36th Street, St. Joseph, Missouri. Plaintiff is, and at all times relevant to this action, was a physician and surgeon licensed to practice medicine in the State of Missouri.

3. Defendant The Medical Protective Company of Fort Wayne, Indiana is a corporation organized and existing under the laws of the State of Indiana with its principal place of business in Fort Wayne, Indiana. Defendant is engaged in the business of medical malpractice insurance and has routinely done business within the Western District of Missouri.

COUNT I

BREACH OF CONTRACT

4. Plaintiff realleges and incorporates herein by reference paragraphs 1-3, *supra*.

5. On or about June 1, 1980, defendant issued and delivered to plaintiff a policy of medical malpractice issuance, policy number 518270 ("policy"), for which plaintiff paid a premium of about $3,552.00. A copy of the policy is attached hereto as "Exhibit 1" and incorporated by reference as if fully set out herein.

6. Under the policy, defendant was obligated to defend plaintiff against and pay damages on behalf of plaintiff *inter alia* for acts and omissions occurring between June 1, 1980 and June 1, 1981 with respect to which plaintiff was alleged or found to be legally responsible in the practice of his profession. In particular, the policy provided:

> "B. Upon receipt of notice, the Company shall immediately assume its responsibility for the defense of any such claim and shall retain legal counsel, who shall defend in conjunction with the legal department of the Company. Such defense shall be maintained until final judgment

> in favor of the Insured shall have been obtained or until all remedies by appeal, writ of error or other legal proceedings deemed reasonable and appropriate by the Company shall have been exhausted at the Company's cost and without limit as to the amount expended . . . "

7. The policy further provided that "D. The Company shall not compromise any claim hereunder without the consent of the Insured."

8. On or about August 10, 1981, an action against plaintiff, styled *Mary Elam, William J. Elam, Jr., Cheryl Vavra, and Robert W. Elam vs. Victor Arana, M.D., Internal Medicine Gastroenterology and Surgery, M.D., Inc. and Methodist Medical Center* ("the *Elam* lawsuit"), Case No. CV381-882CC was filed wherein it was alleged *inter alia* that plaintiff's negligence caused the death of William Elam on December 20, 1980.

9. Plaintiff duly advised defendant of the *Elam* lawsuit. Thereafter defendant retained the St. Joseph, Missouri law firm of Brown, Douglas & Brown to represent plaintiff.

10. On or about August 27, 1981, plaintiff wrote R. A. Brown, Jr. a letter stating in part: "Unless you advise otherwise, I would like to go with this case until the end, as to me it's significantly clear that there are no grounds for the petitions of Mr. Bartimus."

11. In a letter dated September 16, 1981, defendant, through its agent David Jackson, told plaintiff that he would be contacted when consultation and his further action became necessary. Plaintiff was assured that defendant and its attorney's would protect his interest according to the terms of the insurance contract.

12. On or about February 28, 1983, Wendell E. Koerner, Jr., an attorney licensed under the laws of the State of Missouri and a partner in the law firm of Brown, Douglas & Brown, acting on behalf of defendant and as defendant's agent, compromised and settled the *Elam* lawsuit for $97,500.00 without plaintiff's knowledge or consent and contrary to defendant's obligation to defend plaintiff according to paragraph B and not to settle claims without plaintiff's consent under paragraph D of the policy.

13. Defendant authorized and/or ratified Koerner's settlement of the *Elam* lawsuit.

14. On April 7, 1983, plaintiff was advised by defendant that the policy would not be renewed and that another policy insuring plaintiff's professional corporation would be cancelled.

15. The fact that the *Elam* lawsuit was settled has become known in the medical community of St. Joseph, Missouri and surrounding areas.

16. As a direct, natural, proximate and foreseeable result of defendant's unauthorized settlement of the *Elam* lawsuit case and as contemplated by the parties, plaintiff has suffered damages including, but not limited to the following:

(a) Inability to obtain medical malpractice insurance of sufficient breadth and amount to cover plaintiff's medical and surgical practice;

(b) Loss of hospital and surgical privileges;

(c) Loss of patient referrals from and consultations with other physicians;

(d) Loss of patients seeking plaintiff's advice and treatment;

(e) The need to defend himself against specious malpractice claims; and

(f) Severe emotional distress, including anxiety, loss of sleep, nausea, embarassment [sic], and fear of performing surgery.

17. Plaintiff was not advised of the settlement of the *Elam* lawsuit until after the settlement had been executed. Defendant intentionally failed to advise plaintiff of the contemplated settlement of the *Elam* lawsuit because defendant knew plaintiff would object thereto. Neither defendant nor its agent Koerner investigated the facts of the case and this settlement were without regard to the actual underlying facts and circumstances.

18. Defendant's intentional violation of its contractual duties was malicious, wanton and done with reckless disregard to plaintiffs' rights.

19. Plaintiff at present is unable to ascertain the exact amount of his damages, but believes them to be in excess of $4,000,000.

WHEREFORE plaintiff prays for an award of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $10,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

COUNT II

TORTIOUS VIOLATION OF THE COVENANT OF GOOD FAITH AND FAITH [sic] DEALINGS

20. Plaintiff realleges and incorporates herein by reference in paragraphs 1-18, *supra*.

21. Defendant, through in-house counsel and its employment of Wendell Koerner of the law firm of Brown, Douglas & Brown, assumed control over the legal proceedings brought against plaintiff and was then obligated to deal with plaintiff with the utmost good faith.

22. Plaintiff, as above described, stated that he did not consent to the settlement of the claims against him, but to the contrary, he wanted the action opposed.

23. Defendant, as above described, settled the *Elam* lawsuit.

24. Defendant had no right whatsoever to settle the *Elam* lawsuit without plaintiff's consent because of the contractual prohibition on such settlements. Defendant knew that it had no such right and knew that plaintiff had objected to settlement and would continue to object to settlement. Defendant knew that it had an obligation to advise plaintiff that its interests conflicted with those of plaintiff, yet defendant failed to so advise plaintiff. Such acts and omissions were done and performed in bad

faith, without just cause or excuse and with full knowledge by defendant that its acts and omissions were wrongful.

WHEREFORE, plaintiff prays for an award of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Punitive damages in the amount of $10,000,000.00;

(d) Costs of this action;

(e) Such other relief as may be appropriate.

COUNT III

NEGLIGENCE

25. Plaintiff realleges and incorporates herein by reference in paragraphs 1-15and 20-22, *supra*.

26. Defendant negligently breached its duty to defend plaintiff in the *Elam* case by:

(a) Failing to investigate the facts and circumstances of the case;

(b) Failing to confer with plaintiff;

(c) Failing to select reasonably competent local counsel in St. Joseph, Missouri;

(d) Failing to adequately oversee and supervise the actions of local counsel;

(e) Failing to advise plaintiff of pending settlement negotiations;

(f) Settling the case without plaintiff's consent.

27. As a direct and proximate result of the negligent acts and omissions of defendant as above described, plaintiff was injured as set forth in paragraph 19.

WHEREFORE, plaintiff prays for an award of:

(a) General damages in the amount of $1,000,000.00;

(b) Special damages in the amount of $3,000,000.00;

(c) Costs of this action;

(d) Such other relief as may be appropriate.

Respectfully submitted,
VICKER, MOORE & WIEST
By /s/ Loretta W. Moore
Loretta W. Moore
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